**U.S. Department of Justice**
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: - San Diego Date: MAR - 1 1996

In re: MARGARITA GOMEZ-GOMEZ

IN EXCLUSION PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Marco Antonio Rodriguez, Esquire
550 West B Street, Suite 385
San Diego, California 92101

ON BEHALF OF SERVICE: William Manoogian
General Attorney

EXCLUDABLE: Sec. 212(a)(2)(C), I&N Act [8 U.S.C. § 1182(a)(2)(C)] - Controlled substance trafficker

Sec. 212(a)(6)(E)(i), I&N Act [8 U.S.C. § 1182(a)(6)(E)(i)] - Smuggling aliens

APPLICATION: Termination of proceedings

## I. BACKGROUND

In a decision dated March 3, 1995, the Immigration Judge ruled that the Immigration and Naturalization Service was prohibited from establishing the applicant's excludability under section 212(a)(6)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(E)(i) as an alien smuggler due to the Service's declaration at the master calendar hearing that it would not pursue this ground. The Immigration Judge also found that the Service had failed to meet its burden of showing the applicant was excludable under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C) as a controlled substance trafficker and ordered the applicant admitted as a returning lawful permanent resident. The Service has appealed from this decision. The appeal will be dismissed.

The applicant is a 35-year-old native and citizen of Mexico. She was admitted to the United States as a lawful temporary resident on June 8, 1988, and adjusted her status to that of a lawful permanent resident on July 14, 1992. On April 30, 1994, she was detained by United States customs and immigration officials as a suspected controlled substance trafficker and alien smuggler

when she attempted to enter the United States after an overnight trip to Mexico. The officials found 176.4 pounds of cocaine concealed in a roof compartment of the van in which she was traveling. The driver of the van attempted to use a false immigration document to obtain admission.

The applicant told the officials that she knew the driver was carrying a false immigration document. She also said she was aware that he had previously been deported for controlled substance trafficking. She went on to reveal that she did not know who owned the van; she only knew that it belonged to a friend of the driver. The driver is the father of the applicant's son, but the applicant testified at the merits hearing that she is not married to him and they do not live together. The applicant claimed she accepted a ride back to the United States with him only to avoid provoking his violent temper.

No criminal charges were filed against the applicant as a result of the above incident, but she was served with a Notice to Applicant for Admission Detained for Hearing before Immigration Judge (Form I-122) charging her with excludability under sections 212(a)(2)(C) and (6)(E)(i) of the Act, 8 U.S.C. §§ 1182(a)(2)(C) and (6)(E)(i), as a controlled substance trafficker and an alien smuggler.

At the master calendar hearing held on December 12, 1994, the Service general attorney stated that he was not going to pursue the alien smuggling ground of excludability. However, at the merits hearing held on March 3, 1995, a different general attorney appearing on behalf of the Service expressed his desire to proceed on this ground. The Immigration Judge denied this request claiming that the Service was bound by its prior declaration. The general attorney then conceded that the Service could not meet its burden with respect to the controlled substance trafficking ground. In light of this concession, the Immigration Judge concluded that the Service had failed to establish the applicant's excludability by clear, unequivocal, and convincing evidence. He terminated the proceedings and ordered the applicant admitted as a lawful permanent resident.

On appeal, the Service contends that the Immigration Judge erred in denying the general attorney the opportunity to litigate the alien smuggling exclusion ground. The Service provides two legal bases for this claim. First, it argues that the Service may assert exclusion grounds at any time during an exclusion proceeding provided the applicant is informed at some point of the issues confronting him or her and is given a reasonable opportunity to

meet them. Matter of Salazar, 17 I&N Dec. 167 (BIA 1979). The Service claims both requirements were met in the present case since the charging document listed the alien smuggling ground and both parties addressed this issue in their pre-hearing briefs.

The Service also asserts that section 291 of the Act, 8 U.S.C. § 1361 requires an applicant in exclusion proceedings to show that he or she is not inadmissible under any provision of the Act. Thus, even if the Service declined to pursue an exclusion ground at some point during the proceeding, the applicant should not be exempt from addressing the same ground at a later time. In fact, the applicant should be required to do so.

## II. ANALYSIS

The sole issue in the present case is whether the Immigration Judge improperly denied the Service an opportunity to present its evidence regarding the applicant's excludability as an alien smuggler. We do not need to address the alleged impropriety of this action, however, because the Service has failed to establish that it was prejudiced by the Immigration Judge's conduct.

According to Matter of Santos, 19 I&N Dec. 105 (BIA 1984), an alien must establish that he has been prejudiced by a violation of a procedural rule or regulation before the proceeding will be invalidated. While Matter of Santos involves a deportation proceeding, its holding is also applicable in exclusion proceedings. Cf. Matter of Sibrun, 18 I&N Dec. 354 (BIA 1983) (an Immigration Judge's denial of a continuance will not be reversed on appeal unless the alien demonstrates actual prejudice). More importantly, in the interest of fairness, the Matter of Santos standard must apply to both the Service and the alien. Thus, before we will analyze an Immigration Judge's possible procedural violation, the Service must demonstrate that the action materially affected the outcome of the case. The Service has not met this burden in the present case.

At the request of the Immigration Judge during the merits hearing, the Service general attorney summarized the evidence he claimed would establish the applicant's excludability as an alien smuggler. This evidence included the applicant's admission to officials at the border that the driver had asked her to vouch for the validity of his alien registration receipt card, as well as her statement that she had planned to do so if she had been interrogated (Tr. at 44). The applicant was not questioned about the driver's papers, however, and never made any assertions regarding their legitimacy.

The above information does not constitute clear, unequivocal, and convincing evidence of excludability as an alien smuggler. See Matter of Kane, 15 I&N Dec. 258 (BIA 1975); Matter of Huang, 19 I&N Dec. 749 (BIA 1988). 1/ There is no indication that the applicant actually performed an act to encourage or aid the driver to enter or attempt to enter this country. At most, the applicant appears to have considered conspiring to engage in illegal entry. She cannot be excluded solely on the basis of a guilty mind. Cf. U.S. v. Esparza, 876 F.2d 1390 (9th Cir. 1989) (conviction for conspiracy to smuggle alien requires not only knowledge of scheme, but some action taken to further the scheme).

Based on this offer of proof, we find there is insufficient evidence to sustain the Service's burden with respect to the alien smuggling charge. Since the Service has provided no additional evidence on appeal to support its case, we cannot conclude that it was prejudiced by the Immigration Judge's conduct. It appears that the outcome of the case would not have changed even if the Service had been allowed to pursue the alien smuggling charge. Thus, the Service has failed to establish prejudice and we need not evaluate the propriety of the Immigration Judge's action. We therefore dismiss the Service's appeal.

ORDER: The appeal is dismissed.

FOR THE BOARD

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1/ While the general attorney did not have an opportunity to present his evidence in the usual manner, we believe his summary provides an accurate and reliable statement of his case. There is nothing to indicate that he omitted persuasive evidence from his discussion, and the Service has not produced additional evidence on appeal.